5M, INC.

IBLA 97-307, 97-345 Decided March 17, 1999

Appeals from Decisions of the Utah State Office, Bureau of Land Management, rejecting an application for suspension of operations and production for 12 Federal coal leases and terminating five of those leases. U-096476, etc. 1/

Affirmed.

1. Coal Leases and Permits: Suspension of Operations and Production--Federal Land Policy and Management Act of 1976: Wilderness--Mineral Leasing Act: Environment

   Sec. 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (1994), provides for suspension of a Federal coal lease either (1) where, through some act, omission, or delay by a Federal agency, beneficial use of the lease has been precluded, such as where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying the lessee "timely access" to the property; or (2) in the interest of conservation, e.g., to prevent damage to the environment. Where the lessee of Federal coal leases issued before the enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (1994), has neither requested nor been denied authorization to mine, the fact that the leases embrace land within a wilderness study area does not require suspending operations and production on that lease pending completion of wilderness review.

2. Coal Leases and Permits: Termination

   BLM properly terminates a Federal coal lease for failure to produce coal in commercial quantities at the end of 10 years from the effective date of the first lease readjustment after Aug. 4, 1976, where the coal lessee has been unsuccessful in obtaining a suspension of the term of the lease.

1/ The Federal coal leases at issue herein are: U-096476, U-096477, U-098786, U-0101140, U-0101141, U-0103108, U-0103131, U-0103132, U-0103133, U-0113254, U-0115656, and U-0115657.

APPEARANCES: Donald F. Dalton, Esq., Salt Lake City, Utah, for 5M, Inc.; Bruce Hill, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

5M, Inc. (5M), has appealed from a March 12, 1997, Decision of the Utah State Office, Bureau of Land Management (BLM or Bureau), rejecting its application for suspension of operations and production for 12 Federal coal leases located on the Kaiparowits Plateau in Kane County, Utah (IBLA 97-307). 5M has also appealed from an April 1, 1997, BLM Decision terminating five of those leases (IBLA 97-345). 2/ By Order dated June 20, 1997, the Board consolidated the two appeals. 3/

BLM initially issued the coal leases in 1967 for 20-year terms. 4/ In the early 1980's, as part of the wilderness review mandated by section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1994), BLM designated the majority of the lands embraced by the leases as wilderness study areas (WSA's). 5M obtained the leases by assignment, effective October 1, 1986.

In 1987, BLM readjusted the leases and incorporated the diligent development and continued operation requirements added to section 7 of the Mineral Leasing Act (MLA), 30 U.S.C. § 207 (1994), by section 6 of the Federal Coal Leasing Act Amendments of 1976, Pub. L. No. 94-377, 90 Stat. 1087 (1976), as part of the readjusted leases' terms and conditions. The readjusted leases also included special stipulation 13 which stated:

> Application of Section 603(c) of FLPMA would be as follows: activities for the use and development of the lease must satisfy the nonimpairment criteria unless this would unreasonably interfere with rights of the lessee as set forth in the original mineral lease. When it is determined that the rights conveyed can be exercised only through activities that will impair wilderness suitability, the activities will be regulated to prevent unnecessary or undue degradation to wilderness values. Nevertheless, even if such activities impair the area's wilderness suitability the lessee will be allowed to proceed.

2/ The terminated leases are U-0101140, U-0101141, U-0103131, U-0103132, and U-0103133.

3/ The June 20, 1997, Order also took under advisement 5M's request for a stay of BLM's Mar. 12, 1997, Decision. Our resolution of 5M's appeal moots the stay request which we hereby deny.

4/ Although the case file does not include copies of all the leases, it appears that leases U-096476, U-096477, U-098786, and U-0103108 were issued effective Mar. 1, 1967; leases U-0101140, U-0101141, U-0103131, U-0103132, and U-0103133 were issued effective Apr. 1, 1967; lease U-0113254 was issued effective Aug. 1, 1967; and leases U-0115656 and U-0115657 were issued effective Nov. 1, 1967. See Nov. 22, 1989, BLM letter.

By letter dated November 22, 1989, BLM advised 5M that the regulations required a coal lessee to submit a 3-year Resource Recovery and Protection Plan (R2P2) no later than 3 years after the effective date of the first lease readjustment after August 4, 1976, and listed the due date for the R2P2 for each of 5M's leases. 5M did not file an R2P2 for any of the leases.

By Decision dated February 24, 1995, BLM directed 5M to pay $148,281.25 in delinquent lease rentals and interest for the years 1993 and 1994, specifying that if the funds were not remitted to the Minerals Management Service (MMS) within 30 days, payment would be extracted from the Treasury notes 5M had filed as bond coverage and the matter referred to the Office of the Solicitor, U.S. Department of the Interior for lease cancellation in accordance with 43 C.F.R. § 3452.1. 5M did not make the required payment, and by Decision dated October 26, 1995, BLM determined that 5M was in default with an increased debt of $236,189.64, appropriated the bond, and held the coal leases for cancellation. The Board affirmed BLM's Decision in an Order dated March 13, 1986, rejecting 5M's claim that financing difficulties excused the failure to pay rent. 5M did not appeal the Board's Decision, and a civil action seeking lease cancellation was filed in the U.S. District Court for the District of Utah, which granted the Government's motion for summary judgment by order dated August 5, 1997. See United States v. 5M, Inc., No. 2:96CV 0632B (D. Utah). The Tenth Circuit recently affirmed the District Court by Order. United States v. 5M, Inc., No. 97-4188 (10th Cir., Jan. 27, 1999). To the extent that the present appeal is not moot, we shall consider it.

By letter dated February 6, 1997, 5M applied for a suspension of operations and production on the leases pursuant to section 39 of the MLA, 30 U.S.C. § 209 (1994), which authorizes suspensions "in the interest of conservation." 5M asserted that BLM issued the leases containing an estimated 1 billion tons of recoverable low-sulfur coal and 1 to 2 billion tons of in situ burning coal at a time when development of coal resources was encouraged, but that the subsequent designation of the leased area as a WSA and the September 1996 establishment of the Grand Staircase Escalante National Monument precluded 5M from developing the leases. 5M contended that, under these circumstances, a suspension would be in the interest of conservation since that term subsumed protection of the environment as well as efficient use of the coal resource, and that a suspension was proper even though operations had not commenced on the leases.

Denial of the suspension request would be patently unfair, 5M argued, since, on May 14, 1992, BLM had granted a suspension of operations and production for coal lease U-1362 held by PacifiCorp under substantially similar circumstances, viz.: Both lessees held leases within WSA's on the Kaiparowits Plateau; both had been prevented from developing the leases due to BLM's failure to complete environmental assessments; and both faced lease termination because they had not been able to diligently develop their leases. 5M maintained that the unresolved status of the coal lands on the Kaiparowits Plateau, a circumstance beyond its control, precipitated its inability to develop the leases, and that granting PacifiCorp's suspension request while denying 5M's request would be arbitrary and capricious, given that the conditions affecting PacifiCorp also thwarted 5M's development activities. 5M proposed that, because the WSA's affecting its leases

were created before the readjustment of its leases, the suspension should be granted retroactive to the lease readjustment date, citing BLM's suspension of PacifiCorp's lease retroactive to the date the WSA was created.

In its March 12, 1997, Decision rejecting 5M's application for suspension of operations and production, BLM stated that, to qualify for a suspension, a lessee must have submitted a written justification demonstrating that the suspension would be in the interest of conservation; must have received authorization to mine and commenced onsite mine development; and must have a lease rental and royalty account in good standing with MMS. See BLM Manual, § 3483.33.A.1.b. BLM found that 5M had failed to meet any of these requirements.

BLM first found that 5M's lease accounts were not in good standing with MMS, citing 5M's failure to pay rentals on its coal leases since 1992, the Board's March 13, 1996, affirmance of BLM's October 26, 1995, Decision declaring 5M in default, and the consequent pending judicial action for lease cancellation. BLM next concluded that, although the leases were located in WSA's, special stipulation 13 of the leases allowed 5M to develop the leases at any time as long as appropriate approvals had been obtained, and that, therefore, 5M's failure to submit a permit application package and a detailed mine plan to the appropriate agencies undermined 5M's claim that the WSA designation precluded lease development and acquisition of requisite authorizations to mine. Finally, BLM determined that 5M had not shown that BLM had ever denied beneficial use of the leases for environmental reasons, or that suspension of the leases served conservation of the resource better than cancellation or termination of the leases.

BLM distinguished 5M's situation from that of PacifiCorp on the grounds that, although PacifiCorp's lease initially contained no WSA's, some of its land was included in a WSA 21 months after the effective date of the lease, while 5M obtained its leases after the establishment of the WSA's which, in any event, did not prevent development of 5M's leases.

BLM's Decision further found that granting the suspension would be contrary to statutory provisions requiring the diligent development of coal within 10 years, since all of 5M's leases were due to be terminated in 1997 for lack of diligent development, and that the conservation needs of the public would be no less served by cancellation or termination of the leases. Accordingly, BLM rejected 5M's suspension application. 5M appealed this Decision to the Board. 5/

On April 1, 1997, BLM issued a Decision terminating coal leases U-0101140, U-0101141, U-0103131, U-0103132, and U-0103133 for failure to

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5/ In a separate Decision also issued on Mar. 12, 1997, BLM terminated coal leases U-096476, U-096477, U-098786, and U-0103108 effective Mar. 1, 1997, for failure to meet diligent development requirements by that date. 5M did not appeal that Decision, and the termination of those four leases has, therefore, become final.

meet diligent development requirements. The Decision explained that the leases had been readjusted effective April 1, 1987, and made subject to the diligent development requirement mandating the production of commercial quantities, i.e., 1 percent, of each lease's recoverable coal reserves prior to the end of the 10-year diligent development period commencing on the effective date of the first lease readjustment after August 4, 1976. The provisions of both 30 U.S.C. § 207 (1994) and 43 C.F.R. § 3452.3, BLM noted, directed the termination of any lease not producing commercial quantities of coal at the end of 10 years. Since the leases had not met the diligent development requirements, BLM terminated them effective April 1, 1997.

5M appealed the termination of these leases, arguing that its suspension application prevented lease termination. Thus, the resolution of both appeals hinges on the outcome of 5M's challenge to BLM's rejection of the suspension request.

In its Statement of Reasons (SOR), 5M contends that its lease and royalty accounts are in good standing because it cured any default by tendering all lease and royalty payments to BLM in October 1996 in conjunction with the pending judicial suit to cancel the leases. 5M further asserts that its inability to develop the leases was not due to inaction on its part but was caused by BLM's efforts to prevent permitting or additional work on the leases. In support of this assertion, 5M has submitted a letter from Jerry Glazier, the president of 5M, dated March 18, 1997, in which he describes a February 21, 1995, meeting with BLM officials. According to the letter, when 5M advised BLM that it was "there to commence processing final steps for permitting mining operations on the Kaiparowits Coal Field leases owned by 5M," BLM told the company "to forget it." (SOR, Ex. B at 2.) 5M interpreted this meeting as a refusal by BLM to allow the company to take the final steps of permitting necessary to get the leases under production and as an indication of the futility of pursuing the matter. Id.

5M maintains that BLM's rejection of the suspension request is arbitrary and unfair, because its inability to develop the leases due to the WSA designation corresponds to the situation faced by PacifiCorp. 5M criticizes the justification offered by BLM for treating the two lessees differently, arguing that not only were both lessees' leases issued prior to WSA designation, but that PacifiCorp's lease was transferred to it after creation of the WSA just as 5M's leases were assigned to it after establishment of the WSA's. Thus, 5M insists that BLM's denial, given the prior approval of the substantially similar PacifiCorp application, was arbitrary, capricious, and without a rational basis.

BLM notes that 5M asserted in the judicial proceedings concerning termination of the leases for failure to timely submit rental that economic difficulties hindered its development of the leases. BLM argues that 5M's assertion in those proceedings collaterally estops it from now claiming that BLM actions thwarted its diligent development of the lease. BLM submits that 5M's unsupported contention that BLM somehow impeded lease

activities fails to demonstrate that BLM created the problems plaguing the leases, or that the leases would have been developed but for BLM's interference. 5M's previous recitation of the depressed economy, high unemployment, low coal prices, and environmental opposition as the causes of its financing woes establishes that market conditions, not BLM actions, precipitated the lack of lease development, and, BLM argues, unfavorable market conditions do not justify granting lease suspensions.

According to BLM, 5M has also failed to demonstrate that granting the suspension would be in the interest of conservation. BLM discounts 5M's reliance on BLM's approval of PacifiCorp's suspension application, observing that PacifiCorp, unlike 5M, was in good standing and had not defaulted on its leases. 5M's complaint that WSA designation interfered with its ability to develop the leases must fail, BLM submits, because 5M has not demonstrated that the designation impinged on lease development. Even assuming that the allegations in the letter from 5M's president are true, BLM maintains that they do not justify the suspension, given 5M's failure to seek the requisite approvals by submitting a permit application and detailed mining plans to the appropriate agencies. BLM concedes that if those applications had been filed and rejected, then 5M might have been able to successfully argue that it had been prevented from developing the leases; however, absent those applications, 5M's sheer speculation does not prove that BLM denied it beneficial use of the leases. Since the lack of lease development stemmed from financial and market-related factors which do not entitle a lessee to a suspension, BLM insists that 5M's application was properly rejected.

[1] Section 39 of the MLA, as amended, 30 U.S.C. § 209 (1994), empowers the Secretary or his delegate to suspend operations and production under a mineral lease "in the interest of conservation," thereby extending the term of the lease for the suspension period. We have construed this statutory section as providing for suspension of a Federal coal lease either (1) where, through some act, omission, or delay by a Federal agency, beneficial use of the lease has been precluded, such as where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying the lessee "timely access" to the property; or (2) in the interest of conservation, that is, to prevent damage to the environment. Alfred G. Hoyl, 123 IBLA 169, 190-91, 99 I.D. 87, 98-99 (1992) (Hoyl I), reaffirmed as modified, 123 IBLA 194(A), 100 I.D. 34 (1993) (Hoyl II), aff'd, 129 F.3d 1377 (10th Cir. 1997). The burden of showing entitlement to a suspension rests with the lessee. TNT Oil Co., 134 IBLA 201, 203 (1995). 5M has failed to establish that any of the requisite circumstances warranting a suspension exist.

Since, under section 3483.33.A.1.b of the BLM Manual, a suspension application will be denied if the lease account is not current, 5M and

BLM strenuously argue their respective positions concerning the current status of the lease accounts, an issue presently pending before the courts in the cancellation proceeding. We need not decide that question, however, because even if the lease accounts are current, 5M still has not shown that suspension of the leases is warranted.

5M apparently contends that the WSA designation and the requirement in section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1994), that land within a WSA be managed "in a manner so as not to impair the suitability of such areas for preservation as wilderness" have effectively precluded beneficial use of the coal leases and require granting a suspension. The fact that the leases embrace lands within WSA's, however, does not by itself justify granting a suspension. See Southern Utah Wilderness Alliance, 127 IBLA 331, 362, 100 I.D. 370, 387 (1993). Furthermore, special stipulation 13 of 5M's readjusted coal leases clarifies that developmental activities must satisfy the nonimpairment criteria only if doing so would not unreasonably interfere with the lessee's rights as set forth in the original coal lease, and that impairing activities will be allowed to proceed if lease rights can be exercised only through such actions. Thus, the very terms of 5M's readjusted leases refute its contention that creation of the WSA's precluded lease development.

If 5M had filed an application, such as an R2P2 or exploration permit application, which BLM had denied for wilderness considerations, then granting a suspension for the time necessary to complete wilderness studies and consultation and for Congress to render a decision on wilderness status might have been appropriate. See Interim Management Policy and Guidelines for Lands Under Wilderness Review, BLM Manual § H-8550-1 at III.J.2.e, incorporating III.J.1.d; see also Colorado Open Space Council, 109 IBLA 274, 281-82 n.7 (1989). However, 5M did not submit any application. 5M's interpretation of its February 1995 meeting with BLM as a BLM refusal to allow the company to take the final steps of permitting does not establish that filing an appropriate permit application would have been futile, nor does it exculpate 5M's decision not to pursue the matter further. Accordingly, we find that 5M has failed to show that it was denied beneficial use of its leases because of any action by BLM.

We are also unpersuaded that BLM's grant of a suspension to PacifiCorp mandates approval of 5M's suspension request. The specific details of the PacifiCorp case are not before us so we are unable to judge the comparability of the two situations or the reasonableness of PacifiCorp's suspension. In deciding whether to grant a suspension, BLM must decide if the suspension is sought in good faith as part of an effort to develop the lease and not for speculative purposes. Hoyl II, 123 IBLA at 194P, 100 I.D. at 41; see Amca Coal Leasing, Inc., 145 IBLA 125, 133-34 (1998). The factors BLM must consider in making this determination include the past actions of the lessee, as well as the initiation of development on the leasehold. Id. Thus, even if neither PacifiCorp nor 5M had commenced operations on their respective leases prior to seeking suspensions, that similarity does not render BLM's denial of 5M's application arbitrary since 5M's repeated

failure to timely pay the rentals due for its leases and its tender of the delinquent amounts (and its submittal of the suspension request) only after the initiation of suit for lease cancellation and the designation of the affected lands as a national monument undercut its assertion that it seeks the suspension in good faith and not for speculative purposes. 6/ 5M has not shown that BLM's denial in these circumstances was erroneous or otherwise constituted an abuse of discretion. Because 5M has not established that granting the requested suspensions would be in the interest of conservation, we affirm BLM's Decision rejecting the suspension application.

[2] Section 7(a) of the MLA, as amended, 30 U.S.C. § 207(a) (1994), provides that any coal lease "which is not producing in commercial quantities at the end of ten years shall be terminated." This "diligent development requirement," as clarified by 30 U.S.C. § 207(b) (1994) and implementing Departmental regulations, directs that a lessee achieve "diligent development" by the end of the "diligent development period." "Diligent development" is defined at 43 C.F.R. § 3480.0-5(a)(12) as "the production of recoverable coal reserves in commercial quantities prior to the end of the diligent development period." "Commercial quantities" means 1 percent of "recoverable coal reserves" which is "the minable reserve base excluding all coal that will be left, such as in pillars, fenders, and property barriers." 43 C.F.R. §§ 3480.0-5(a)(6), (32). The relevant "diligent development period" is "[t]he effective date of the first lease readjustment after August 4, 1976, for Federal leases issued prior to August 4, 1976." 43 C.F.R. § 3480.0-5(a)(13)(i)(B).

The "diligent development period" for leases U-0101140, U-0101141, U-0103131, U-0103132, and U-0103133 is the 10-year period commencing April 1, 1987, the date the leases were first readjusted. Thus, in order to avoid lease termination, at least 1 percent of the minable reserves of each lease had to have been mined by April 1, 1997.

5M does not assert that it achieved diligent development by the end of the diligent development period. It maintains, instead, that its timely application for suspension of operations and production prevents termination of the leases. Since we uphold BLM's rejection of the suspension application, no basis for extending the diligent development period exists. Accordingly, we affirm BLM's termination of coal leases U-0101140, U-0101141, U-0103131, U-0103132, and U-0103133 for failure to meet diligent development requirements. See 43 C.F.R. §§ 3452.3, 3483.2(a).

To the extent not specifically addressed herein, 5M's other arguments have been considered and rejected.

6/ Furthermore, the adverse economic or market conditions cited by 5M as grounds for its failure to timely pay lease rentals do not fall within the phrase "in the interest of conservation" under 30 U.S.C. § 209 (1994) and, therefore, do not constitute grounds for approval of a suspension under that section. Hoyl II, 123 IBLA at 194L, 100 I.D. at 39-40.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the request for a stay is denied and the Decisions appealed from are affirmed.

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David L. Hughes
Administrative Judge

I concur:

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C. Randall Grant, Jr.
Administrative Judge